

BEFORE THE FOREST PRACTICES APPEALS BOARD

STATE OF WASHINGTON

PILCHUCK AUDUBON SOCIETY,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF NATURAL
RESOURCES; DEPARTMENT OF
ECOLOGY; FOREST PRACTICES
BOARD; and CUSTOM COMMUNITIES
CORPORATION,

Respondents.

FPAB NO. ⁷²~~87~~-7

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER

THIS MATTER came on for hearing before the Forest Practices Appeals Board, William A. Harrison, Administrative Appeals Judge presiding, with board members Norman L. Winn, Chairman and Dr. Martin Kaatz.

This matter is an appeal from the Department of Natural Resources' approval of Forest Practices Application No. FP1914709 issued to respondent Custom Communities Corporation.

Appearances were as follows:

1. Todd D. True for Appellant, Pilchuck Audubon Society
Sierra Club Legal Defense Fund, Inc.
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2. Patricia Hickey O'Brien, Assistant Attorney General,
for Respondent Forest Practices Board
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3. Kathryn L. Gerla, Assistant Attorney General,
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4. Geoffrey Clark (Pro Se)
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5. Jonathon Gurish, Assistant Attorney General,
for Respondent Department of Natural Resources
Attorney General's Office
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The hearing was conducted at Seattle from September 28, 1992 through September 29, 1992. Reporter Gene Barker & Associates provided court reporting services.

Witnesses were sworn and testified. Exhibits were examined, including numerous slides and maps of the application area and surrounding landholdings. From the testimony heard and the exhibits examined, the Forest Practices Appeals Board makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

I.

This case arises in Skagit County, Township 27, Range 10 East, Section 12 in the vicinity of the Tom, Dick & Harry Lakes.

1 The Forest Practices application which forms a basis for this
2 appeal, FP No. 1914709, proposes to harvest approximately 85% of
3 a 20-acre parcel (Exhibit R-1).

4 II.

5 The appeal raises two predominant issues. One relates to
6 spotted owls and the other relates to recreational enjoyment.

7 III.

8 On or about March 5, 1991, the Department of Natural
9 Resources issued a memo from Art Stearns, Supervisor of the
10 Department of Natural Resources, to Regional Managers entitled
11 "Spotted Owl Memo 3" ("Owl Memo #3") (Exhibit R-8). Owl Memo #3
12 sets forth the guidelines for interpreting the language "lands
13 known to contain a breeding pair or the nest or breeding
14 grounds" of federally threatened or endangered species as that
15 phrase is used in emergency rule WAC 222-16-050(1)(b)(i) with
16 regard to the Northern Spotted Owl ("Spotted Owl"). (See
17 Conclusion of Law I.)

18 IV.

19 Owl Memo #3 provides that where an application proposes to
20 harvest or modify spotted owl habitat within 1.8 miles (in the
21 Northern Cascade Range) of a spotted owl nest, or site center of
22 a pair or territorial single as recorded in Washington
23 Department of Wildlife spotted owl data base, the application
24 must be classified as a Class IV-Special, pursuant to WAC 222-
25 16-050(1) (Exhibit R-10).

1 V.

2 In this case, a single territorial, individual owl was
3 sighted approximately one-half mile beyond 1.8 miles of the
4 proposed forest practices area. (Exhibit R-11.) The Department
5 was unaware of the location of this single territorial owl when
6 it received and approved the subject application.

7 VI.

8 The Department classified the subject application as a
9 Class III forest practice using the Owl Memo #3 interpretation
10 of emergency rule WAC 222-16-050(1)(b)(i).

11 VII.

12 Using Owl Memo #3 as a biological guide, the proposed forest
13 practices for this particular site do not pose a potential for
14 adverse impact on the spotted owl.

15 VIII.

16 Turning to recreational issues, the application proposes
17 harvest on 20 acres which is not, in our view, a large site.
18 The 20 acres is located on a slope that is over the rim of a
19 plateau where Tom, Dick & Harry Lakes are located. The 20-acre
20 parcel is surrounded by a large area of federally owned and
21 managed forest.

22 IX.

23 Respondents Custom Communities Corporation and the
24 Department of Natural Resources stipulate that the application
25 does not propose to cut within 50 feet of the southeastern-most
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1 lake contained on the plateau and within the area of the Tom,
2 Dick & Harry Lakes.

3 X.

4 Because of the particular geographic and topographic
5 features of the 20-acre site proposed in this application, there
6 will not be a significant impact on the recreational enjoyment
7 to those visiting the Tom, Dick & Harry Lakes area.

8 XI.

9 Any Finding of Fact which is deemed a Conclusion of Law is
10 hereby adopted as such.

11 CONCLUSIONS OF LAW

12 I.

13 Emergency Rule WAC 222-16-050(1) provides in pertinent part:

14 Application to conduct forest practices involving the
15 following circumstances requires an environmental
16 checklist in compliance with the State Environmental
17 Policy Act (SEPA), and SEPA guidelines, as they have
18 been determined to have potential for a substantial
19 impact on the environment. It may be determined that
20 additional information or a detailed environmental
21 statement is required before these forest practices
22 may be conducted.

19

20 (b) Harvesting, road construction, site preparation or
21 aerial application of pesticides:

22 (i) On lands known to contain a breeding pair of the
23 nest or breeding grounds of any threatened or
24 endangered species; or

25 (ii) Within the critical habitat designated for such
26 species by the United States Fish and Wildlife
Service.

WSR 92-06-04.

1 II.

2 Owl Memo #3 represents a reasonable interpretation of
3 "lands known to contain a breeding pair or the nest or breeding
4 grounds" of federally threatened or endangered species as used
5 in emergency rule WAC 222-16-050(1)(b)(i) as applied to the
6 spotted owl in this case.

7 III.

8 The Department of Natural Resources has the obligation to
9 evaluate the impacts of forest practices on adjacent lands even
10 though impacts are falling on lands that are not under the
11 jurisdiction of the Department of Natural Resources. It has
12 long been established that agencies cannot confine their
13 evaluation of environmental effects to the scope of their
14 jurisdiction. Calvert Cliffs Coordinating Committee v. Atomic
15 Energy Commission, 146 U.S. App. D.C. 33, 449 F.2d 1109 (1970);
16 SAVE v. Bothell, 89 Wn.2d 862, 871-872, 576 P.2d 401 (1978).
17 The Department cannot only look to the four corners of the
18 application in determining what constitutes its environmental
19 impact.

20 IV.

21 Looking at the sum total of the proposed forest practices
22 for this 20-acre parcel, and the stipulation by respondent
23 Custom Communities Corporation, we conclude that the impacts on
24 recreation in the area is not great. In addition, using Owl
25 Memo #3 as a biological guide, we conclude that the proposed
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1 forest practices at this site do not present a potential for
2 substantial impact to the spotted owl in this area.

3 V.

4 The forest practices for this particular site do not raise
5 a potential for substantial environmental impact. However, the
6 Board cautions that had this application proposed harvest on a
7 different type of terrain, visible from other places, this Board
8 may have reached a different result.

9 VI.

10 This Board has jurisdiction to review the validity of rules
11 as applied to the granting or denying of specific forest
12 practice approvals. Snohomish County, et al. v. Department of
13 Natural Resources, et al., FPAB Nos. 89-12 & 89-13. See D/O
14 Center v. Department of Ecology, 119 Wn.2d 761, ____ P.2d ____
15 (1992).

16 VII.

17 Because the forest practices at issue in this case do not
18 have the potential for a substantial impact on the environment,
19 emergency rule WAC 222-16-050(1) as applied in this case is
20 valid. The application was properly classified by the Department
21 as Class III and it is therefore exempt from SEPA.

22 RCW 43.21C.037.

24 VIII.

25 Any Conclusion of Law which is deemed to be a Finding of
26 Fact is hereby adopted as such.

1 From these Conclusions of Law, the Board enters the
2 following:

3 ORDER

4 The approval of the Department of Natural Resources of
5 Forest Practices Application No. 1914709 is hereby affirmed with
6 the addition of the following condition: as a condition to
7 approval of this application, respondents Department of Natural
8 Resources and Custom Communities Corporation shall not authorize
9 any harvest activities within 50 feet of the southeastern-most
10 lake on the plateau near the Tom, Dick & Harry lakes.

11 DONE at Lacey, Washington, this 11th day of December,
12 1992.

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14 
15 HONORABLE WILLIAM A. HARRISON
16 Administrative Appeals Judge

17 FOREST PRACTICES APPEALS BOARD


18
19 
20 NORMAN L. WINN, Member

21
22 
23 DR. MARTIN R. KAATZ, Member

24
25
26

1 Presented by:

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3 Attorney General

4 
5 JONATHON A. GURISH
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8 Attorneys for Respondent
9 Department of Natural Resources

10 Approved as to Form and Notice
11 of Presentation Waived:

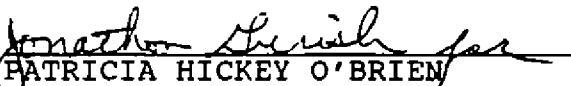
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4 GEOFFREY CLARK
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